

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Insurance
Agent License of James H. Jordan,
License No. 43229.

**ORDER AND RECOMMENDATION ON
THE DEPARTMENT'S MOTION FOR
PARTIAL SUMMARY DISPOSITION**

On November 22, 1999, the Department of Commerce filed a Motion for Partial Summary Disposition in the above-entitled matter with Administrative Law Judge Kenneth A. Nickolai. The Department requested that the summary disposition issues be certified to the Commissioner of Commerce, regardless of the outcome. Several extensions were granted to the Licensee for filing a response. The Licensee filed a response on January 24, 2000. The Department filed a reply on February 3, 2000. The record on this motion closed upon receipt of the Department's reply.

Michael J. Tostengard, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130 represents the Department of Commerce (Department) in this matter. Matthew L. Fling, Attorney at Law, 5100 Eden Avenue, Suite 306, Edina, Minnesota 55436 represents James H. Jordan (Licensee).

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Commissioner of Commerce order that:

1. The Department's Motion for Summary Disposition on Counts 28, 29, 30, 31, 33, and 35, be GRANTED
2. The Department's Motion for Summary Disposition on Count 32 be DENIED.

ORDER

IT IS HEREBY ORDERED that:

1. The foregoing Recommendations are certified to the Commissioner of Commerce for final decision.
2. The remaining issues in this case are stayed indefinitely pending the Commissioner's Order on the certified issues.

Dated this ____th day of March, 2000.

KENNETH A. NICKOLAI
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject, or modify the Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Gary A. Lavasseur, Deputy Commissioner, Enforcement and Licensing Divisions, 133 East Seventh Street, St. Paul, Minnesota 55101, telephone (651) 296-2594, to ascertain the procedure for filing exceptions or presenting argument.

MEMORANDUM

The Department has brought disciplinary proceedings against Licensee based on Licensee's sale of a life insurance policy to Marion Dahlquist (Dahlquist policy). The marketing materials which the Department asserts were used in making that sale were identified as violating Minn. Stat. §§ 60K.11, subd. 1(x), and 72A.20, subd. 1, Minn. R. 2970.0500, subps. 3 and 31, and Minn. R. 2970.1500, subp. 1. In addition, the Department alleged that Licensee distributed material that had not been approved the Canada Life Assurance Company (the insurer), in violation of Minn. Stat. § 60K.11, subd. 1(iii).

The marketing materials at issue fall into two categories. The first category is three pages entitled "Private Pension for Marion Dahlquist" faxed from the Department to Licensee and acknowledged to be used by the Licensee in selling the policy to Marion Dahlquist. The second category consists of twenty-four pages entitled "Private Pension for Darrell & Beverly Walklin." The three pages Respondent has acknowledged using in the Dahlquist sale have a counterpart in the Walklin materials.

Count 28 alleges that by entitling the marketing materials as a "Private Pension," Licensee misrepresented the policy in violation of Minn. Stat. § 72A.20, subd. 1. That statutory provision states:

Subdivision 1. **Misrepresentations and false advertising of policy contracts.** Making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, or statement misrepresenting the terms of any policy issued or to be issued or the

benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender insurance, shall constitute an unfair method of competition and an unfair and deceptive act or practice in the business of insurance.^[1]

Count 29 alleged that Licensee failed to identify the policy being sold as life insurance in the marketing materials as required by Minn. Rule 2790.0500, subp. 31, which states, "An advertisement must state clearly the insurance coverage being offered." Count 30 alleged that statistical information was used in marketing materials without disclosure of sources and inclusion of relevant facts in violation of Minn. Rule 2790.1500, subp. 1. That provision states:

Subpart 1. **Relevant facts.** An advertisement or representation, whether written or oral, relating to the dollar amounts of claims paid, the number of persons insured, or similar statistical information relating to any insurer or policy must not be used unless it accurately reflects all of the relevant facts. Irrelevant statistical data shall not be used. The sources of all statistical information must be disclosed in the advertisement or representation.^[2]

Count 31 alleged that Licensee's use of the words "tax free" without inclusion of an explanation of how taxation affects life insurance benefits is a violation of Minn. Rule 2790.0500, subp. 3. That rule states:

Subp. 3. **Statements regarding tax benefits.** An advertisement must not state a policy's benefits are tax-free unless an explanation of the rules applicable to the taxation of these types of policy benefits are clearly shown with equal prominence and in close conjunction with the statement. An advertisement of a benefit for which payment is conditioned upon confinement in a hospital or similar facility must not state that the benefit is tax-free.^[3]

Counts 33 and 35 allege that Licensee engaged in deceptive acts by using the marketing materials to sell the Dahlquist policy and by misrepresenting the liquidity of that policy in violation of Minn. Stat. § 60K.11, subd. 1. That statute provides for the discipline of insurance agent licenses where the agent:

(ix) has misrepresented the terms of any actual or proposed insurance contract;

(x) has engaged in any fraudulent, coercive, deceptive, or dishonest act or practice whether or not such act or practice involves the business of insurance;^[4]

The Department moved for summary disposition on Counts 28, 29, 30, 31, 33, and 35, asserting that no material issues of fact remain for hearing that Licensee violated Minn. Stat. §§ 60K.11, subd. 1(x), and 72A.20, subd. 1, Minn. R. 2970.0500, subps. 3 and 31, and Minn. R. 2970.1500, subp. 1, in the manner of selling the Dahlquist policy and the materials used to make that sale. The Department moved for summary disposition on Count 32, asserting that Licensee had used the sales materials without approval from Canada Life, in violation of Minn. R. 2790.2100, subp. 2. In addition, the Department requested that this matter be certified to the Commissioner, regardless of the outcome.^[5]

An Administrative Law Judge may recommend or grant summary disposition of a case where there is no genuine issue as to any material fact.^[6] Summary disposition is the administrative equivalent of summary judgment in district court because summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.^[7] The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts when considering motions for summary disposition in contested cases.^[8]

When considering a motion for summary judgment, the facts must be reviewed in the light most favorable to the non-moving party.^[9] All doubts and factual inferences must be resolved against the moving party.^[10] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.^[11] To defeat a motion for summary judgment successfully, the nonmoving party must show that specific facts are in dispute that have a bearing on the outcome of the case.^[12] The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden.^[13] To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden.^[14]

Regarding Counts 28, 29, 30, 31, 33, and 35, the Department relies upon Licensee's admissions regarding what was presented in selling the Dahlquist policy in claiming that no issues of fact remain for hearing. Licensee asserts that the Department has no evidence of what marketing materials were presented in selling that policy and therefore genuine issues of material fact remain for hearing.^[15] The Department indicates that three pages of those materials are not in dispute and those pages contain the violations alleged.^[16] The remaining pages of the sales materials have been included in two documents filed by Licensee and the Department maintains that Licensee has admitted to the contents of the Dahlquist materials being substantively identical.^[17]

The Licensee responded to the Department's Requests for Admissions that he had sold the Dahlquist policy.^[18] Regarding the marketing materials used in the sale, Licensee admitted to using a document entitled "Private Pension for Marion

Dahlquist."^[19] In response to numerous questions about specific contents of the "'private pension' marketing materials," Licensee responded that the "document speaks for itself."^[20] Licensee admitted that the "'private pension' marketing materials," contained "statistical information in a 'Financial Projections Summary,' a pair of bar graphs, and a 'Financial Alternatives Account Balance Comparison.'"^[21] Licensee admitted that the "'private pension' marketing materials, also listed as 'desirable features in a retirement investment': a death benefit which is income tax free, contribution of pre-taxed dollars, and tax free accumulation of funds."^[22]

Licensee asserts that only the first three pages of the materials provided by the Department are part of the marketing materials used to sell the Dahlquist policy.^[23] Regarding the remaining pages, "I [Licensee] specifically deny that the remaining materials attached to Mr. Loney's affidavit were part of the specific marketing materials provided to Marion Dahlquist."^[24] The only specific difference (from the marketing materials provided) identified in the affidavit is the age of the prospective policyholder.^[25] Licensee asserts that his answers to the Department's request for admissions were based on the three pages acknowledged as received from the Department.^[26]

In addition to Licensee's assertions regarding the specific marketing materials, a description was provided as to how such materials are obtained by the Licensee for presentation to prospective policyholders. Licensee's office manager described the process as follows:

4. I did not produce any of the "Private Pension Plan" marketing materials, including the materials attached hereto as Exhibit A, and I do not believe they were produced by Mr. Jordan. To the best of my knowledge and belief, any such marketing materials, including the marketing materials attached hereto as Exhibit A, were produced (or at least caused to be delivered to our office) by Michael J. Loney of Canada Life pursuant to the following process:

- (a) Mr. Jordan would meet or communicate with a client and would then contact Mr. Loney, or direct me to contact Mr. Loney, to provide him with data on the client and information as to the type of product desired.
- (b) After obtaining the data and information from Mr. Jordan or me, Mr. Loney would prepare, or cause to be prepared, the marketing materials, using software produced by a third party company, the identity of which I am unaware. It is my belief that the software had been licensed directly to Canada Life or Mr. Loney by the third party company. I am unaware of any software being licensed to Mr. Jordan that would have had the capability of producing the "Private Pension Plan" marketing materials, and in any case, Mr. Jordan's office did not have technology capable of utilizing the software that could produce these marketing materials. In addition, the original

versions of the "Private Pension Plan" marketing materials included color graphics, and Mr. Jordan's office did not utilize a color printer, capable of producing those color graphics.

- (c) After preparing the marketing materials, Mr. Loney would deliver the materials to Mr. Jordan's office for subsequent presentation to the client. In my position as office manager I often received the materials directly from Mr. Loney or the delivery person.
- (d) If Mr. Jordan felt that any revisions needed to be made in the marketing materials, he would contact Mr. Loney and request or suggest that appropriate changes be made.^[27]

The marketing materials attached to the office manager's affidavit contain a sheet entitled "Financial Projections Summary" with projections for a person 57 years of age. Marion Dahlquist was 57 years old when Licensee made his sales presentation to her in 1992. That page is one of the three pages acknowledged to have been presented to sell the Dahlquist policy.

Licensee has also provided evidence of what the marketing materials are and how they are produced. Those materials are the product of a software program licensed by Kettley Publishing, known as "Retirement Quick-Plan."^[28] Licensee maintains that he was not licensed to use that software in 1992 and therefore he could not have produced the materials at issue. Licensee also notes that Loney was licensed to use the software in 1992.^[29]

As discussed above, summary disposition is appropriate where there are no issues of material fact. Licensee has characterized this matter as an agent merely presenting materials prepared by another with the agent bearing no responsibility for the contents of those materials.^[30] That issue was addressed in a contested case hearing as follows:

Respondents contend that Minn. Rule 2790.2100 set forth above immunize them from liability for the use of sales materials approved by Western States. The Judge agrees that this rule specifically makes the insurer liable for the use of improper sales material. However, the rule does not specifically insulate agents or agencies from the application of other rules or statutes. As has been pointed out above, agents and agencies also fall under the prohibitions contained in Minn. Stat. §§ 60A.17, 72A.20 and Minn. Rule 2790.0500. These other provisions are also applicable in a case such as this. The Judge firmly believes that it was not the intent of Minn. Rule 2790.2100 to completely insulate Minnesota agents and agencies from liability for the use of improper sales materials even if those materials had been approved by the insurer.^[31]

Since insurer approval of "improper sales materials" does not constitute a defense to the Department's allegations, the source of the pension plan marketing materials is not a genuine issue of material fact in the charges regarding improper sales presentation. An insurance agent is subject to discipline for presenting improper materials regardless of their source.

Licensee has not argued that the materials clearly state that insurance is being sold.^[32] The only issue raised regards what materials were actually presented to Marion Dahlquist. Since three pages are acknowledged by Licensee as part of the presentation, those pages will be addressed separately.

The acknowledged pages are the title page, "Seeking the Ideal Retirement Investment," and "Financial Projections Summary."^[33] None of these pages identify the product being sold as a life insurance policy. Nor do they identify the significant costs arising from the insurance policy sold to Marion Dahlquist. The "Financial Projections Summary" uses unidentified assumptions to arrive at data purporting to compare savings accounts, annuities, mutual funds, tax-free bonds, and the "private pension." No description of the tax provisions being cited is made in these materials. On their face, these documents violate the standards for insurance marketing materials contained in Minn. Stat. §§ 60K.11, subd. 1(x), and 72A.20, subd. 1, Minn. R. 2970.0500, subps. 3 and 31, and Minn. R. 2970.1500, subp. 1.

Licensee maintains that summary disposition is not appropriate since the other pages of the marketing material delivered to Marion Dahlquist are not present and those pages could have a "curative" effect on the three pages identified as presented.^[34] The Department points out that Licensee claims not to remember what other documents might have been presented in selling the Dahlquist policy.^[35]

The nonmoving party does not meet its burden to defeat a summary disposition motion with speculation as to possible issues of fact that might arise.^[36] Licensee is in the best position to present affirmative evidence that his marketing presentation complied with the applicable statutes and rules. There is no evidence in the record on this motion that any portion of the materials used in selling the Dahlquist policy complied with those standards. Denying summary disposition on this record would rely solely on speculation unsupported even by an affidavit purporting to identify curative evidence. Licensee has not met the nonmoving party's burden on summary disposition. Summary disposition on Counts 28, 29, 30, 31, 33, and 35 in favor of the Department, based upon the three acknowledged pages is appropriate.

DENYING SUMMARY DISPOSITION ON OTHER MATERIAL

Regarding the remaining pages in the marketing materials, Licensee correctly points out that the Department has not directly established that those particular pages were delivered to Marion Dahlquist. Licensee asserts that such proof is required to determine that a violation occurred. The Department responded that Licensee has previously admitted using all the materials in selling the Dahlquist policy.^[37] Licensee

has modified that admission by asserting that only the three acknowledged pages were included in the admission.^[38]

The essence of Counts 28, 29, 30, 31, 33, and 35 is that the marketing materials presented to Marion Dahlquist were misleading. Without direct evidence of what was contained in the marketing materials presented, the contents of those documents must be inferred from other evidence. Where, as here, the adverse action sought is to sanction a license, the Minnesota Supreme Court has set out the evidentiary standard for sanctions as follows:

We trust that in all professional disciplinary matters, the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft.^[39]

The Department is proceeding without direct evidence of the use of materials in a sales presentation where the contents of those materials is asserted to be a violation of standards. The evidentiary heft required for sanctioning a license is not present under these circumstances on summary disposition. Upon obtaining the testimony of witnesses, assessing credibility, and making inferences based upon the evidence, such "evidence with heft" may be obtained. Summary disposition based on the unacknowledged materials is inappropriate.

DENYING SUMMARY DISPOSITION ON INSURER APPROVAL OF MATERIALS

Count 32 alleges that Licensee distributed the marketing materials used in the Dahlquist sale without the approval of the insurer. The Licensee denies that the materials were used without approval. Affidavits from witnesses have been submitted to support Licensee's assertion that the documents were provided by the insurer's regional manager.^[40] Loney, the person identified as the source of the documents, denied having provided the marketing materials.^[41] With this conflict in evidence, the only way in which to resolve the issue is to hear testimony and make findings concerning credibility. This is a genuine issue of material fact going directly to the heart of the allegation in Count 32. Summary disposition is inappropriate on this issue.

SUMMARY OF CONCLUSIONS

There being no genuine issues of material fact as to Counts 28, 29, 30, 31, 33 and 35, and the Department having demonstrated that it prevails under the law on those Counts, the Department is entitled to summary disposition in its favor on those Counts. Therefore the Administrative Law Judge recommends that summary disposition be GRANTED to the Department on Counts 28, 29, 30, 31, 33 and 35 and DENIED on Count 32. The Respondents' motion to limit evidence is DENIED.

It is appropriate to certify the recommendations for summary disposition at this time rather than first completing the hearing on the remaining issues as requested by

the Department, as resolution of these issues will likely advance ultimate resolution of this dispute.^[42]

K.A.N.

^[1] Minn. Stat. § 72A.20, subd. 1.

^[2] Minn. Rule 2790.1500, subp. 1.

^[3] Minn. Rule 2790.0500, subp. 3.

^[4] Minn. Stat. § 60K.11, subd. 1.

^[5] Department Memorandum, at 16.

^[6] Minn. R. 1400.5500 K.

^[7] *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63,66 (Minn. App. 1985); Minn. R. Civ.P. 56.03.

^[8] See Minn. R. 1400.6600

^[9] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. Ct. App. 1984).

^[10] See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

^[11] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

^[12] *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

^[13] *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

^[14] *Id.*

^[15] Licensee Memorandum, at 3-4.

^[16] Department Reply, at 4.

^[17] Department Reply, at 3-4. The differences are in specific numbers such as the age of the sales prospect and anticipated age at retirement.

^[18] Tostengard Affidavit, Exhibit A, at 6.

^[19] *Id.*, Exhibit A, at 15.

^[20] *Id.*, Exhibit A, at 15-20.

^[21] *Id.*, Exhibit A, at 19.

^[22] *Id.*, Exhibit A, at 18.

^[23] Jordan Affidavit, at 3.

^[24] *Id.*

^[25] *Id.*

^[26] *Id.*

^[27] Ballweg Affidavit, at 2-3.

^[28] Kerr Affidavit, at 1.

^[29] *Id.*

^[30] Licensee Memorandum, at 11.

^[31] ***In the Matter of the Insurance Agents' Licenses of Kane and Pohl***, OAH Docket No. 4-1004-2903-2 (Recommendation issued August 20, 1990).

^[32] Licensee asserts that expert testimony is required to determine that the documents are violative of the applicable statute and rules. Licensee Memorandum, at 13. In assessing questions of law, the Administrative Law Judge can decide ultimate questions without the assistance of expert testimony. The purpose behind the standards governing insurance marketing materials is to ensure that unsophisticated persons are not misled. No expert testimony is required to assess whether these materials are misleading. Licensee's assertion that there is no evidence in the record on which to determine a violation is incorrect. The pages themselves are in the record and they fail to comply with the plain language of the applicable statutes and rules.

^[33] Fling Affidavit, Exhibit B.

^[34] Licensee Memorandum, at 12.

^[35] Department Reply, at 4.

^[36] *DHL, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997).

^[37] Department Reply, at 2.

^[38] Jordan Affidavit, at 3.

^[39] *In the Matter of Wang*, 441 N.W.2d 488, 492 (Minn. 1989).

^[40] See Jordan Affidavit, Ballweg Affidavit, and Kerr Affidavit.

^[41] Loney Deposition, at 48-49.

^[42] See Minn. Rule 1400.7600.